

**DETERMINATION OF CONTRACT BY EMPLOYER IN CONSTRUCTION
INDUSTRY**

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*To my beloved Father and Mother,
Sister and Brother,
And Wilson.*

Thank you for your support, guidance and everything.

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ABSTRACT

In the construction industry, the standard form of building contract is one of the key methods of ameliorating a potentially fractious relationship to achieve a common end. All standard forms of construction contract contain clauses for determination of contracts. There is a distinction between “*determination*” and “*termination*”. Briefly, termination of a contract takes place at a point in time in the course of a contract period when a legally binding contract is brought to an end before it has been discharged by performance due to the acts of one or both parties. Under standard form of construction contract, there are several clauses provided for determination of contract by the employer and the determination of contract by contractor. Under both PWD 203A and PAM 1998 standard forms of contract, it has provided several conditions which allow the employer to determinate the contract of the employment. Under both contracts, there are several default by the contractor which will caused the employer to determine their employment, such as suspension of works by contractor; failure to proceed regularly and diligently; failure to remove defective works; assignment or sub-letting without consent; failure to execute works in accordance with the contract and bankruptcy, insolvency, etc of the contractor. Therefore, the employer may determine the contract pursuant the defaults of the contractor. Normally, some of the contractors are unfamiliar with the clauses provided under the contract. Therefore, by investigating the most frequent reasons for determination by employer according to the standard form of contract, it will be able to create awareness among the contractors. So, the contractors can prevent from being determined by the employer.

ABSTRAK

Dalam industri pembinaan, borang kontrak standard merupakan salah satu cara untuk mengurangkan hubungan tegang dan mencapai satu penamatan yang mutlak. Semua borang kontrak standard mengandungi klausa penamatan kontrak. Terdapat perbezaan antara perkataan “*determination*” dan “*termination*”. Secara umumnya, penamatan sesebuah kontrak merupakan satu kontrak yang jilid mencapai satu hujung penamatan sebelum kontrak tersebut dilepaskan secara kesempurnaan kerja yang dilakukan oleh satu atau kedua-dua pihak. Dalam borang kontrak standard, terdapat beberapa klausa bagi penamatan kontrak oleh majikan dan penamatan kontrak oleh kontraktor. Dalam kedua-dua JKR 203A dan PAM 1998 borang kontrak standard, terdapat beberapa keadaan yang dibekalkan untuk membolehkan majikan menamatkan kontrak tersebut. Kesilapan kontraktor yang dibekalkan dalam kedua-dua kontrak tersebut adalah seperti menggantung perjalanan kerja tanpa sebab yang munasabah, gagal meneruskan kerja mengikut aturan dan tekunnya, gagal menukar atau mengganti kerja yang cacat, sub-sewa kerja tanpa pengetahuan majikan dan kebangkrapan atau ketaksolvenan kontraktor. Oleh itu, majikan boleh menamatkan kontrak tersebut mengikut kemungkiran yang dilakukan oleh kontraktor. Biasanya, sesetengah kontraktor kurang biasa dengan klausa dalam kontrak. Oleh yang demikian, dengan mengkaji sebab yang paling kerap menyebabkan penamatan kontrak oleh majikan mengikut borang kontrak standard, ini akan meningkatkan kesedaran kontraktor. Dengan ini, kontraktor boleh mengelakkan supaya kontrak tidak ditamatkan oleh majikan mereka.

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LIST OF ABBRIEVATIONS

AC	Appeal Cases, House of Lords
ALL ER	All England Law Reports
AMR	All Malaysia Reports
BLR	Building Law Reports
CIDB	Construction Industry Development Board
CLJ	Current Law Journal (Malaysia)
ER	Equity reports
IEM	Institute Of Engineer Malaysia
JKR	Jabatan Kerja Raya
MLJ	Malayan Law Journal
NLJ	New Law Journal
PAM	Pertubuhan Arkitek Malaysia
PWD	Public Work Department
S.O.	Superintending Officer
TLR	Times Law Report

CHAPTER ONE

INTRODUCTION

1.1 Background Study

Construction in Malaysia spans a wide spectrum of activities stretching from simple renovation works for private homes to massive construction projects. Every such building activity may create its own unique set of requirements and circumstance. The different sectors including employer groups, contractors, suppliers, manufacturers, professionals have their own interests which are very often divergent and competing in nature.¹

The standard form of building contract is one of the key methods of ameliorating a potentially fractious relationship to achieve a common end. It evidences the legal relationship between the parties in contract and provides the administrative procedures

¹ Sundra Rajoo. (1999). *The Malaysian Standard Form of Building Contract* (the PAM 1998 Form). 2nd Edition, Malayan Law Journal Sdn Bhd. Pg 3

necessary for the realization of the legal relationship. Any standard form of contract would need to appreciate and incorporate all the special requirements and circumstances that a project would call for. A standard form of building contract would therefore be useful in expressing the obligation of the parties and setting out the reasonable clarity the scope of the project.²

In Malaysia, there are several types of Standard Form of Contract available to use in construction, such as PWD 203A, PAM, CIDB, IEM and etc. The PWD forms of contract are the de facto standard forms of contraction contract used by the Malaysian public sector. In fact, this has been in recent years increasing usage of the PWD forms with amendments by the private sector as well, especially in civil engineering construction.³ However, the PAM standard form of building contract was very widely used in the private sector.

All standard forms of construction contract contain clauses for determination of contracts. There is a distinction between “*determination*” and “*termination*”. The common law right to terminate or ‘repudiate’ a contract can arise in either of two situations. First, one party may make clear that it has no intention of performing its side of the bargain. Secondly, that party may be guilty of such a serious breach of contract that it will be treated as having no intention of performing. A breach of this kind is known as a ‘repudiatory breach’. In both cases, the innocent party has a choice; either to ‘affirm’ the contract and hold the other party to its obligations (while claiming damages as appropriate for the breach), or to bring the contract to an end. If repudiation is opted for, then both parties are released from any further contractual obligation to perform.⁴

² Ibid.

³ Lim Chong Fong. (2004). *The Malaysian PWD Form of Construction Contract*. Thomson Asia Pte Ltd. Pg 1

⁴ Murdoch, J and Hughes, W. (1997). *Construction Contracts: Law and Management*. E & FN Spon. London. Pg 324

By contrast, many building contracts make provision for ‘determination of the contractor’s employment’ in specified circumstances. Not all of these circumstances amount to sufficiently serious breaches of contract to justify termination; indeed, some of them are not breaches at all. Such ‘determination’ clauses normally lay down procedure (giving notice etc.), which must be followed if the determination is to be effective. They also deal with the consequences, financial and otherwise, of the determination.⁵

According to John Wong, 2005, termination that often termed to be a taboo among the players in the construction industry owing to the severity of the consequences arising herefrom. Common words such as determination or forfeiture are termed as synonymous to termination. Briefly, termination of a contract takes place at a point in time in the course of a contract period when a legally binding contract is brought to an end before it has been discharged by performance due to the acts of one or both parties.⁶

Under standard form of construction contract, there are several provisions of clauses for determination of contract by the employer and the determination of contract by contractor. Under PWD 203A, there is only provision for determination by the employer. However, the contractor’s right to determine his employment under the contract remains enforceable under the common law and the Contract Act 1950.

⁵ Murdoch, J and Hughes, W. (1997). *Construction Contracts: Law and Management*. E & FN Spon. London. Pg 324

⁶ John Wong. (2005). Terminated or be Terminated. *The Malaysian Surveyor*. 39.1. Page 12

1.2 Problem Statement

There are several types of standard form of contract available in Malaysia, such as PWD 203A, PAM (with quantities), CIDB, IEM and etc. In each of the standard form of contract, there are clauses provided for the determination of contract. These include the determination of contract by employer and determination of contract by contractor. In this study, it will focus on the determination of construction contract by the employer according to the PWD 203A and PAM standard form of contract.

Under both standard forms of contract, it provide several reasons which give the employer the right to determinate the contract of the employment. Under clause 51 (a) PWD 203A Form, it allows the employer to determinate the contract if there is any default by the contractor, such as the contractor without reasonable cause suspends the carrying out of the works; the contractor fails to proceed regularly and diligently with the works; the contractor fails to execute the works in accordance with the contract; the contractor refuses or neglects to comply with a written notice from the SO; or the contractor fails to comply with the provisions of clause 27 (a), (b) and (d). Besides that, under clause 51 (b), the employer may determinate the contract if the contractor becomes bankrupt or insolvent.

Besides that, under clause 25.1 of the PAM 1998 form, it provides comprehensive grounds for termination provision invoked by the employer. Such grounds comprise the default of the contractor such as contractor suspending the works without any reasonable cause, the contractor's failure to proceed regularly and diligently, the contractor's failure to execute the works in accordance with the contract, the contractor's failure to correct or remedy any defective works as instructed, and the contractor's failure to obtain written consent prior to sub-letting the works (John Wong, 2005).

Clause 25.0 under PAM 1998 seeks to improve on the common law rights of the parties, sets out the procedure to be followed and the rights and liabilities of the parties after the exercise of the power of determination until the final settlement. It is the contractor's employment under the contract which is determined and the parties' rights after a valid determination continue to be governed by the express contractual provisions. The contract itself does not come to an end but remains in being, albeit in a modified form.⁷ The effect of determination is to relieve the contractor of his obligation to perform further work under the contract or to remove his right to do so, depending upon who is exercising the right of determination.⁸

According to our ex-Minister of Entrepreneur and Co-Operative Development, Datuk Seri Mohamed Nazri Aziz, they will black list the contractors who has registered under Pusat Khidmat Kontraktor (PKK) and failed to complete the projects. All the contractors are given opportunity to complete the project within the certain period. Therefore, they will not have second chances for those contractors who have failed to carry out their duties to proceed the works. Their failure to complete the works will affect the third parties' benefits. For an example, under the Minister of Entrepreneur and Co-Operative Development, there are a lot of shop lot projects. Their failure of completing the shop lot projects will cause many people cannot start their business on time.⁹

Besides, due to issues on the cracks which appeared on a fly-over of the Middle Ring Road 2 project, the landslide along the North-South Expressway, the air-conditioning and structural defects of the Sultan Ismail Hospital in Johor Bahru, and the design problems of the East Coast Highway, our Works Minister Datuk Seri S. Samy Vellu promised to revoke the contracts of those who did not measure up. The PWD

⁷ See the Tanzanian case of .

⁸ Sundra Rajoo, *ibid*, Pg 246

⁹ D J Dolasoh. (2004). *Senarai hitam kontraktor gaga.*, Berita Minggu. 29 February 2004.

(Public Works Department) officials also instructed to revoke the contracts of errant contractors.¹⁰

According to the standard form of construction contract, there are several reasons listed under the provided clause which allow the employer or the contractor to determinate the contract. What are the most frequent reasons that has caused the determination of contract by the employer in the actual construction industry? Therefore, this study will focus on the most frequent disputes associated with the determination of contract by employer in construction projects which are referred to the court.

1.3 Objective

The objective of this study is

- To identify the most frequent disputes associated with the determination of contract by employer in construction projects which are referred to the court

¹⁰ Hamidah Atan. 2004. Errant Contractors to be Fired. New Straits Times. 18 October 2004

1.4 Scope of Study

The scope of this study is focused on the reasons for the determination of contract by employer according to the standard form of contract. Although the determination of contract by contractor is included in the scope of determination of contract in construction, this study is not going to discuss on that area.

There are several types of standard form of contract used in Malaysia. Therefore, for this research, this study will focus on both PWD 203A and PAM 1998 (with quantities) Standard Forms of Contract as they are the most common types of contracts used in Malaysia.

On the other hand, there is no limitation for the court cases referred to in this study in terms of type of projects as long as the case is related to the determination of contract by employer in construction and it was reported in the Malaysia Law Journal.

1.5 Significance of Study

Under the standard form of contract, there are clauses provided for employer to determinate the contract according to the reasons as stated. Normally, some of the contractors are unfamiliar with the clauses provided under the contract. Therefore, by investigating the most frequent reasons for determination by employer according to the

standard form of contract, it will be able to create awareness among the contractors. So, the contractors can prevent from being determined by the employer.

Furthermore, this study also can be used as a basic guidance for those who are involved in the construction industry, such as employer, architects, contractor's consultant and etc., in relation to the determination of the contract by employer. Once they clearly understand the clauses provided under the contract, the contractor will perceive the importance of his rights to complete the works as required to prevent being determined by the employer. The contractor's adviser also can advise the contractor so that unnecessary disputes can be avoided and assuring project success and tie-up a better relationship among the contractual parties.

There are some previous theses regarding determination of contract. However, they focused on the implication of determination of contract towards other parties involved in the construction industry (Zainul Asri Haji Che Omar, 1995), and the study of the determination of contract by JKR (Che Rozilawani Che Awang, 2003). Hence, for this study, the author will focus on the reasons for determination by the employer according to the PWD 203A and PAM Standard Form of Contract and the consequences of the determination of contract by employer towards the parties involved in the contract.

1.6 Research Methodology

In order to achieve the research objectives, a systematic process of conducting this study had been organised. Basically, this research process consists of five major stages, which involve identifying the research issue, literature review, data collection, data analysis, conclusion and suggestions.

1.6.1 Stage 1: Identifying The Research Issue

The research issue arises from the intensive reading of books, journals, articles and newspaper cutting which can easily be attained from the UTM library. From the research issue, the objectives of the study have been identified. This research is carried out to review the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and the consequences of determination of contract by employer towards the parties involved in the contract.

1.6.2 Stage 2: Literature Review

After the research issue and objectives have been identified, various documentation and literature review regarding to the research field will be collected to achieve the research objectives. Generally, secondary data is collected from the latest reading materials in printing form such as books, journals, research papers, reports, newspaper as well as from the internet. It is important to identify trends and developments over time in construction industry, as well as the general state of knowledge concerning the subject area of determination of contract such as background, definition, procedures, relevant events and etc.

1.6.3 Stage 3: Data Collection

After identifying all the background and relevant issues through literature review, legal cases based on previous court cases which are related to the research issue will be collected from Malayan Law Journals via UTM library electronic database, namely Lexis-Nexis Legal Database. The previous court cases which are related to the determination of contract by employer in construction will be sorted out from the Malayan Law Journals cases.

1.6.4 Stage 4: Research Analysis

Once the previous related court cases under Malayan Law Journal are collected, the author will conduct case study on the related legal cases. The case study is started by carefully reviewing and clarifying all the facts of the cases. All of the cases will focus on two parts, disputes associated with the determination of contract by employer in construction which are referred to the court and the other is the consequences of determination of contract by employer towards the parties involved in the contract. After the author has focused on the issues presented by each case, discussion and comparison would be done. The author will compare and identify the most frequent disputes associated with the determination of contract by employer in construction which are referred to the court and also the consequences of the determination of contract towards the parties involved.

1.6.5 Stage 5: Conclusion and Recommendations

In the last stage, the author will review the whole process of the study with the intention to identify whether the research objectives have been achieved. After presenting the research findings, further research will be suggested.

5.4 Conclusion

At the end of this study, we can conclude that from the Malaysia Law Journal cases, the most frequent dispute associated with the determination of contract by employer is the failure of contractor to proceed the works on site regularly and diligently. Besides that, the failure of suspension of works also one of the most frequent dispute which caused the employer determine the contractor's employment. Therefore, from the result of this study, the contractor should always maintain their progress on site and make sure they always proceed their works on site regularly and diligently. The contractor should not suspend their works without reasonable reasons. Hence, the contractor may avoid the employer to determine their employment. Determination of contract will influence the progress of works and make the relationship between the employer and contractor become worse.

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